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In The

Supreme Court of the United States

October Term, 1997

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS, ET AL., *Petitioners*,

v.

RONALD R. YESKEY, *Respondent*.

PETE WILSON, et al., *Petitioners*,

v.

JOHN ARMSTRONG, et al., *Respondents*.

STATE OF CALIFORNIA, et al., *Petitioners*,

v.

DERRICK CLARK, et al., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third and Ninth Circuits

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BRIEF OF *AMICI CURIAE* STATES OF NEVADA, ALABAMA, ALASKA, ARKANSAS, COLORADO, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, TERRITORY OF GUAM, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI STATES

Nevada and the other *amici* states submit this brief as *amici curiae* in support of two separate petitions for writs of certiorari: *Commonwealth of Pennsylvania v. Yeskey*, Case No. 97-634; and *Armstrong v. Wilson* and *Clark v. State of California*, Case No. 97-686. The *amici* states urge the Court to reverse the decisions of the Third Circuit Court of Appeals and the Ninth Circuit Court of Appeals, and declare that the Americans with Disabilities Act and the Rehabilitation Act (hereinafter "statutes" or "laws") do not apply to the states' management of their convicted felons.

The *amici* states recognize that the statutes attempt to advance a commendable goal - the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life. However, the application of the statutes to state prisons improperly interferes with a unique and long recognized essential state function: the management of its prisons. The lower courts' decisions would allow Congress to intrude upon this core state function merely by enacting a broadly worded law of general applicability. This is contrary to the traditional rule that whenever Congress intends to intrude upon a core function, it must do so with an unmistakable and specific statement within the language of the statute.

This theory of congressional authority, if permitted, will upset the constitutional balance of power between the national and state governments. It will allow Congress *carte blanche* to intrude upon the core state function of prison management without any warning to the affected states, and without any indication or assurance that adequate or deliberate

consideration was given to the compelling interest of the states in administering their prisons. The *amici* states believe this will disturb the essential and delicate balance between the national and state governments.

These statutes cannot be held applicable to state prisons absent an unequivocal expression of congressional intent to impact a core state function. In the complete absence of a clear statement of congressional intent, however, five circuit courts of appeal have come to different conclusions regarding the applicability of the statutes to state prisons, resulting in inconsistent decisions and uncertainty among the states. This split among the circuit courts must be resolved.

The *amici* states share a strong and serious concern for the ability of their prison administrators to manage dangerous and manipulative groups of inmates confined within state prison systems. Inmates are well known for demanding special treatment or costly and inappropriate concessions, for a variety of reasons ostensibly based upon constitutional rights but which more often than not are designed to breach the safe, secure and orderly management of the prison. To permit the intrusion of federal regulators or courts into complex decisions involving the classification, housing, employment, education, transfer, safety and security of inmates will inhibit the policy-based choices of prison officials with potentially disastrous results.

Finally, the fiscal impact of the application of the statutes to state prison systems presents serious concern for state legislatures that are presented with a multitude of demands for the allocation of limited resources. The construction of new prisons, or the renovation of older prisons, are tremendously costly undertakings. Given the special problems posed by inmate populations, flexibility in

the use and management of prison facilities is critical. Limiting the ability of prison administrators to accommodate and control the diverse and constantly fluctuating prison populations within reasonable fiscal constraints can have a strong adverse impact on state budgets.

REASONS FOR GRANTING THE PETITIONS

Petitioners' requests for these writs should be granted for the following reasons. In enacting the statutes, Congress failed to include a clear and unequivocal statement that it intended to interfere with the core state function of prison management. Without such a statement, the language of each statute is ambiguous and they cannot be held to apply to the core state function of state prison systems. However, three of the five circuit courts which have considered this issue have reached the contrary conclusion, holding that the broad language of the statutes does include state prisons. The very fact that the circuit courts are split on the question of the application of these statutes to state prison systems demonstrates this ambiguity, and leaves all states without direction on this question. This Court is requested to provide the states with necessary guidance.

There are compelling public policy reasons behind the requirement that Congress must make its intentions clear in the language of a statute when it intends to impact a core state function. First, placing the language in a proposed statute puts all interested parties on notice that Congress is considering passage of a law that may make substantial changes impacting a specific and vital area of state government. This gives affected groups an opportunity to be heard on the proposed legislation. Second, the opportunity for public debate increases the likelihood that Congress will have given adequate and careful deliberation to various

viewpoints prior to enacting a law which could change the balance between the national and state governments.

> In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

United States v. Bass, 404 U.S. 336, 349 (1971). Third, requiring a clear expression of intent avoids costly litigation and contradictory results in courts throughout the country. Finally, it avoids uncertainty by state legislators as to whether they must reconsider the allocation of limited state resources.

The unique and difficult problems of operating state prisons fall squarely within the purview of state government. Prison management is a core state function, and this has been clearly recognized by the Court.

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.

Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973). *See also Procunier v. Martinez*, 416 U.S. 396 (1974) (Problems facing state prison systems acknowledged to be difficult and intractable and best left to the expertise of trained prison administrators). The *amici* states share a strong concern that many laws appear to be passed without considering their impact on state prison systems. This underscores the importance that the Court affirm that *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985) and *Gregory v.*

Ashcroft, 501 U.S. 452 (1991) require a specific and clear statement in the text of the statute if Congress intends that an act apply to state prison systems.

I.

PRISON MANAGEMENT IS A CORE STATE FUNCTION WHICH CANNOT BE SUBJECT TO THE PROVISIONS OF THE ADA AND THE REHABILITATION ACT BECAUSE EACH LACKS A CLEAR STATEMENT OF CONGRESSIONAL INTENT

This Court has recognized that prison management is a core state function.

> It is difficult to imagine an activity in which a state has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. . . Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of these problems.

Preiser, *supra*; *see also*, *Procunier supra*, at 412.

> One of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task.

If the Court accepts the argument that the statutes are applicable to state prisons, it will upset the constitutional balance between federal and state governments, and allow a recognized core state function to be legislated by Congress merely by the enactment of broadly worded statutes. Under the Supremacy Clause, Congress may impose its will upon the states, "so long as it is acting within the powers granted it under the Constitution." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "For this reason, 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." Id., at 460, citing *Atascadero*, 473 U.S. 234, 243 (1985). The Court in *Gregory* explained:

> [I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); *see also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984). . . 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971).' *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989).

The ADA broadly defines "public entity" to be "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or

States or local government." 42 U.S.C.A. § 12132 (West 1995). The Rehabilitation Act contains similar sweeping language to describe government programs or activities. 29 U.S.C. § 794(b). Both the ADA and the Rehabilitation Act prohibit discrimination by public entities against disabled persons. The Rehabilitation Act prohibition is limited to any program or activity of any state or local government entity receiving federal financial assistance.

It is far from clear whether Congress intended for the statutes to apply to prisons. A prison is not ordinarily contemplated as being a "public entity" in the usual sense of the word. A prison does not invite members of the general public on its premises; there is no right of the general public to have access to prison facilities or property. In *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991), the court held that "the Federal Bureau of Prisons does not fit the definition of 'programs or activities.'" Similarly, the Fourth Circuit has held that correctional facilities "do not provide 'services,' 'programs' or 'activities' as those terms are ordinarily understood." *Torcasio v. Murray*, 57 F.3d 1340, 1347 (4th Cir. 1995). Prisons do not sponsor programs, services or activities for the general public, and inmates do not have a right to participate in any programs, services or activities which a prison system devises. *See Garza v. Miller*, 688 F.2d 480, 485-486 (7th Cir. 1982) *cert. den.*, 459 U.S. 1150 (1983), no property or liberty interest in prison employment; *Olim v. Wakinekona*, 461 U.S. 238, 245 (1983), no justifiable expectation of inmate to be incarcerated in any particular prison; *McCord v. Maggio*, 910 F.2d 1248, 1250-1251 (5th Cir. 1990), inmate has no right to any particular classification, which is a matter left to the discretion of prison officials; *Meachum v. Fano*, 427 U.S. 215, 224-225 (1976).

Prison services, programs and activities are not available to all inmates for many reasons, as they were not designed for the general benefit of inmates but rather to enhance public safety, to reduce recidivism, to protect prison guards, to reduce costs, to occupy inmate time, to segregate inmates into manageable and orderly groups, and to encourage inmates to earn money to pay back the state for costs associated with incarceration. Prison officials must be free to deny inmates access to all manner of programs and activities for countless reasons involving safety, security, and the cost-effective and orderly operation of prison systems.

The legislative history for both statutes contains no specific indication that Congress even considered whether prison systems should be subject to their provisions. One portion of legislative history which makes a statement regarding the desired effect of the ADA is the following excerpt from S.Rep. No. 116, 20; H.R.Rep. No. 485 (II):

> There is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life. Further, there is a need to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.

In a prison environment, an administrator's primary concern is not the integration of all inmates into the prison's economic and social mainstream. This is simply not a viable or even desirable goal given the types of individuals who comprise prison populations and the fact that many will never be released into society. Safety and security are the

immediate and paramount concerns of prison administrators, who must be able to make such decisions without being concerned the decision will be deemed discriminatory because the inmate had a disability. A prison administrator must be able to make decisions necessary to protect any inmate, even if that means exclusion of an inmate due to a disability.

Under the Eighth Amendment standard traditionally applied in the prison context, inmates have no right to participate in any programs, services or activities in a prison system, except that their basic human needs must be met. But even these can be provided in different ways depending upon the security concerns present. For example, an inmate need not be permitted access to a cafeteria or law library in order to receive food or legal materials. There simply are too many variables to consider in determining whether a particular inmate should be a participant in a specific program or activity.

Under the ADA,

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12132 (West 1995). A qualified individual with a disability is a person who "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities." 42 U.S.C.A. § 12131(2) (West 1995). Inmates do not "qualify" for services, programs or activities simply by being incarcerated. To assert that being a convicted felon qualifies a person to access to all facilities and functions in a prison system regardless of safety,

security or other legitimate penological concerns completely distorts any common sense or logical interpretation of these statutes. Even inmates who are otherwise eligible to be considered for participation in programs or activities are denied placement for many reasons, such as the existence of an enemy situation, lack of space, disciplinary record, risk of violence, nature of crime committed, remoteness of medical facility, etc. Compelling the complete accommodation of all disabled inmates regardless of other considerations significantly chills the ability of prison staff to keep safety and security the overriding concern in reaching difficult decisions regarding prisoner assignments.

Prisoners are distinguishable from nonprisoners in that they are serving time for having committed a crime. While recognizing they do not forfeit all of their constitutional rights, many of their rights are diminished by the fact of imprisonment, or necessarily limited in the interest of safety to the general public and to the prison population.

> The Act [ADA] was not designed to deal specifically with the prison environment. It was intended for general societal application. There is no indication that Congress intended the act to apply to prison facilities irrespective of the reasonable requirements of effective prison administration." *Gates v. Rowland*, 39 F.3d 1439, 1446-47 (9th Cir. 1994).

The very fact that Congress was silent in both the legislative histories and in the language of the statutes as to whether they were intended to encompass the operations of state prisons, allows only one conclusion: the laws cannot be applied to state prisons. In the absence of a clear and deliberate expression of Congress' intent to alter the balance between the states and the federal government where a core

state function is implicated, then the statutes cannot be applied to state prisons.

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches.

City of Boerne v. Flores, 117 S.Ct. 2157, 2172 (1997). The operation of state prison systems is a core state function of paramount concern to every state. The states must retain their states' ability to manage their prisons without federal micromanagement. Absent a clear statement in the statute evidencing an intent by Congress to intrude upon state prison operations, the ADA and the Rehabilitation Act cannot be held to apply to state prisons.

II.

APPLICATION OF THE STATUTES TO STATE PRISONS OPENS A PANDORA'S BOX OF LITIGATION OPPORTUNITIES AND IMPOSES IMMENSE COSTS

By recognizing that prison management is a core state function in *Preiser*, the Court also recognized the institutional need for inmate and staff safety, and the deference that must be given to prison officials.

> Absent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prison or substitute their judgment for that of the trained penological authorities charged with the administration of such facilities.

Taylor v. Freeman, 34 F.3d 266, 268 (4th Cir. 1994) (*citing Turner v. Safley*, 482 U.S. 78, 84-89 (1987).

"The need to maintain internal order, discipline and security differentiates prisons from outside society." *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979). The propensity of inmates for violence and dangerousness is presumed to be greater than that of nonprisoners. The desirability of a particular inmate's participation in various programs and activities is dependent on many factors. The management and infrastructure of state prisons have been developed to deal with the unique nature of imprisonment and the multiple problems that arise daily in managing inmates. "Prisons are dangerous places." *McGill v. Duckworth*, 944 F.2d 344, 345 (7th Cir. 1991). If the violent criminals housed in prison are not properly monitored and segregated, the weaker or disabled inmates may become the prey of the more violent or manipulative inmates. This risk of violence is pervasive in prison, and prison officials have a duty under the Eighth and Fourteenth Amendments to provide protection to prisoners who are reasonably in danger of being victimized by their fellow inmates.

If Congress is allowed to legislate the management of state prisons under these statutes, states will be compelled to divert substantial resources in restructuring prison facilities and in defending actions brought under this legislation. "Application of the ADA and Rehabilitation Act would have serious implications for the management of state prisons, in matters ranging from cell construction and modification, to inmate assignment, to scheduling, to security procedures." *Torcasio*, 57 F.3d at 1345. *See also Amos v. Maryland Dept. of Public Safety and Correctional Services*, 1997 WL 581652 (4th Cir. Md.)

> Each of the Circuits holding that the Rehabilitation Act and the ADA apply to state prisons has gone to extraordinary lengths to acknowledge the chaos likely to result from their holdings.

Besides the responsibility of modifying prison facilities, extensive time and resources would be required to handle the additional litigation.

> Prisoners are not a favored group in society; the propensity of some of them to sue at a drop of a hat is well known; prison systems are strapped for funds; the practical effect of granting disabled prisoners right of access that might require costly modifications of prison facilities might be the curtailment of educational, recreational, and rehabilitative programs for prisoners, in which event everyone might be worse off.

Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997) *citing Bryant v. Madigan*, 84 F.3d 246, 249 (C.A. 7 (Ill.) 1996).

Inmates filing lawsuits under ADA and Rehabilitation Act theories have lost no time in demonstrating their ability to assert rights to all manner of privileges by claiming various disabilities. (Inmate confined to infirmary claimed entitlement to personal cable TV, *Aswegan v. Bruhl*, 113 F. 3d 109 (8th Cir. 1997); One-armed inmate claims he was removed from law library job due to his disability, *Gilkey v. Robson*, Case No. 95-2060, pending in U.S. District Court for the Northern District of Illinois; Inmate claiming to be disabled (medical status disputed) claims he should be exempt from having to wear restraints, *St. Pierre v. McDaniel*, Case

No. CV-N-94-792-ECR, pending in U.S. District Court for the District of Nevada; Inmate demands more law library time because it takes him longer to complete tasks due to mobility limitations, *Crayton v. Mayes*, Case No. CV-F-96-5842, pending in the U.S. District Court for the Eastern District of California; Inmate and wife, HIV positive, demanded conjugal visit, *Bullock v. Gomez*, Case No. CV-95-6634, U.S. District Court of California; Inmates claimed Dept. of Corrections' refusal to provide free nicotine patches violated ADA (Minnesota); Inmate claims he was denied trustee position due to HIV status, *Dean v. Knowles*, 912 F.Supp. 519 (U.S. D.C. for Southern District of Florida, 1976); Inmate complains that ADA inmates with special diets have to eat last, *Halpin v. Mathews*, Case No. GC-G 94-1935, pending in U.S. District Court for Middle District of Florida; Inmate claims that as a totally disabled vet, his costs of supervision and restitution should be paid by the state, *Jaap v. Olsen*, Case No. 93-14177, U.S. District Court for Southern District of Florida; States also report a substantial percentage of cases from inmates demanding that all facilities and programs be modified to accommodate inmates with disabilities as defined in the statutes.

The ADA and the Rehabilitation Act are emerging as the new inmate civil rights litigation frontier. The *amici* states are experiencing increasing workloads related to inmate claims involving these statutes. States have reported significant numbers of cases involving such claims (e.g., current cases include 38 in California; 8 in Florida; 5 in Nevada; 6 in Iowa; 6 in Pennsylvania; 8 in Indiana). Not only do these lawsuits divert state resources, but they shift the burden in litigation. The inmate need only allege he possesses some sort of disability; prison officials must demonstrate they cannot make a reasonable accommodation. Considering the broad definition of "disability" under the ADA (28 CFR Ch. 1, (35.104 Definitions) which appears to

include a wide range of physical or mental impairment, virtually any inmate can claim he had some disability requiring accommodation into all prison services, activities and programs. Such a heavy requirement would eviscerate the existing Eighth Amendment standard which has historically been applied to the prison setting, replacing it with a standard which is, as a practical matter, unworkable in the prison context. The ADA and the Rehabilitation Act effectively provide greater rights to disabled prisoners than to non-disabled prisoners. The fiscal impact to the states of accommodating these demands is of a magnitude which most will be unable to absorb without a severe impact upon other essential state operations.

Of particular concern to the *amici* states is that the application of these statutes to prisons will erode the flexibility that prison administrators need in managing difficult and volatile prison populations. As foreseen by the Seventh Circuit in *Crawford*, the result may be the curtailment of programs for all prisoners. This is what occurred following the enactment of the Religious Freedom Restoration Act in 1993 and prior to this Court's decision in *City of Boerne v. Flores*. A number of state departments of corrections were forced to limit their religious programs due to the impact of inmate demands and litigation. The dramatic increase in prisoner demands for religious accommodation and ensuing lawsuits severely curtailed the ability of prison officials to provide religious services to inmates.

There is no question that Congress was well-intended in enacting these statutes to ensure that disabled persons in the mainstream of American society have reasonable access to public programs, activities and services. However, as to prison systems, in which decisions are not made according to what would be normal or desirable in the real world and can

have life or death consequences, application of these statutes is a serious encroachment upon a core state function.

CONCLUSION

The petitions for writ of certiorari should be granted.

Respectfully submitted,

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